

Complaint

87 F.T.C.

IN THE MATTER OF
FORD MOTOR COMPANY

ORDER OF REMAND, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9001. Complaint, Dec. 10, 1974—Remand Order, April 13, 1976

Opinion and order affirming a ruling of the administrative law judge that advertisements of Ford Motor Company, a Dearborn, Mich., manufacturer of automobiles, represented that the gasoline-consumption rates specified in the ads approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips, and that Ford lacked a reasonable basis for the representation. The order adopted the initial decision's findings of facts 1-10 and 13 as findings of the Commission, set aside the remainder of the initial decision, and remanded the complaint to the administrative law judge to conduct hearings in respect to allegations that Ford made unsubstantiated fuel economy claims for its Pinto, Capri, Mustang II, Maverick, and Comet model small cars.

Appearances

For the Commission: *Wallace S. Snyder and Heidi P. Sanchez.*

For the respondent: *Robert L. Wald, Carleton A. Harkrader, Robert A. Skitol, Thomas W. Brunner and Lewis M. Popper, Wald, Harkrader & Ross, Washington, D.C. and David R. Larrouy, Dearborn, Michigan.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ford Motor Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ford Motor Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at The American Road, Dearborn, Michigan.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, distribution, sale, and advertising of various products including automobiles.

PAR. 3. Respondent causes the said products, when sold, to be transported from its place of business in various States of the United States to purchasers located in various other States of the United

States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated and caused the dissemination of advertisements concerning its aforementioned products including automobiles in commerce by means of advertisements printed in magazines and newspapers distributed by the mail and across State lines and transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products including automobiles.

PAR. 5. Among the advertisements so disseminated or caused to be disseminated by respondent are the advertisements attached as Exhibits A and B.

PAR. 6. Said Exhibits A and B and others substantially similar thereto contain one or more false, deceptive and misleading representations and fail to disclose facts which are material in the light of the representations contained therein. Therefore, the representations contained in said advertisements were, and are, deceptive and/or unfair.

PAR. 7. Said Exhibits A and B and others substantially similar thereto (hereinafter referred to as said advertisements) represent, directly or by implication, that the gasoline consumption rates specified in the advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips.

PAR. 8. In truth and in fact, at the time respondent made the representations as alleged in Paragraph Seven respondent did not possess and rely upon a reasonable basis for making these representations. Therefore the said advertisements were, and are unfair and/or deceptive.

PAR. 9. Said Exhibits A and B and others substantially similar thereto represent, directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraph Seven.

PAR. 10. In truth and in fact, at the time respondent made the representations as alleged in Paragraph Nine respondent had no reasonable basis for making the representations as alleged in Paragraph Seven. Therefore, the said advertisements were, and are deceptive and/or unfair.

PAR. 11. Respondent failed to disclose in said advertisements that it had no evidence that any or all of the conditions under which the tests described in the advertisements were conducted approximated or equalled the conditions under which an ordinary driver would operate his automobile when taking long or cross-country trips and that respondent had no evidence that would tend to show whether or not the conditions under which said tests were run were typical or atypical of conditions encountered by ordinary drivers.

PAR. 12. The facts set forth in Paragraph Eleven are material in light of the representations contained in said advertisements and their omission make these advertisements misleading in a material respect. Therefore, the said advertisements were, and are deceptive and/or unfair.

PAR. 13. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Ford Motor Company has been and now is in substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of automobiles of the same general kind and nature as that sold by respondent.

PAR. 14. The use by respondent of the aforesaid unfair and/or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of automobiles manufactured by respondent. Further, as a result thereof, substantial trade is being unfairly diverted to respondent from its competitors.

PAR. 15. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair or deceptive acts or practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

February 19th: General Environments Corporation tested the highway mileage of Ford Motor Company's small cars. Today: the results.

EXHIBIT

A

All 5 Ford Motor Company small cars got OVER 28 MPG.

The test.

At 7:15 AM, February 19th, five 1974 Ford Motor Company small cars (wheelbase under 112") were driven from Phoenix to Los Angeles to learn the kind of mileage they could get. The cars were a Ford Pinto, a Ford Maverick, a Ford Mustang II, a Mercury Comet and one of Mercury's Capris.

All the cars were regular production models with standard engines

and transmissions. They weren't however, brand new. They had been broken in to simulate 6,000 miles of normal driving. All the cars used regular gas and had normal dealer preparation. The drivers were not professionals. And they did not exceed 50 MPH. In many respects, the test was similar to one run on December 28th, 1973, where five 1974 Ford LTD's delivered an average of 18.8 MPG.

The results.

These results show dramatically that these five small cars from Ford and Lincoln-Mercury did deliver economical gas mileage. Of course, the mileage you will get depends on many factors

equipment, engine displacement, vehicle weight, local road conditions and your personal driving style. So the mileage you get may be less or even more than the figures quoted here.

Ford and Lincoln-Mercury dealers offer more types of gas-saving engines for small cars than anyone.

One of the most important factors determining small car mileage is a gas-saving engine. And Ford and Lincoln-Mercury dealers offer more types of gas-saving engines for small cars than anyone.

Two 4-cylinder engines. Some manufacturers of so-called "economy" cars don't even offer a 4-cylinder engine. Ford Motor Company makes two different sizes of 4-cylinder engines: A 2.0 liter which was used in Pinto and Capri for this test, and the 2.3 liter used in Mustang II. The 2.0 liter is the smallest displacement engine available today in an American-made car from any major American manufacturer. Ford Motor Company sells more 4-cylinder engines in American-made cars than anyone else.

Two 6-cylinder engines. Ford and Lincoln-Mercury dealers offer two sizes of 6-cylinder engines for small cars: a 200 CID which was used in Maverick and Comet for this test, and an optional 250 CID

engine for all of its car lines.

A V-4 engine. Ford Mustang II is the only car made by a major American manufacturer to offer an optional V-4. Mercury's imported Capri offers an optional 2.8 liter V-6 engine at a cost thousands of dollars less than any other V-6 powered import.

An economy V-8 engine. Ford and Lincoln-Mercury dealers offer a 302 CID V-8 engine, the smallest displacement V-8 available from any major American manufacturer. It provides extra performance while still delivering good gas mileage.

Explanation of engine designations. CID OR LITER, the total volume, in cubic inches or liters (metric system), that the pistons displace in all the engine's cylinders.



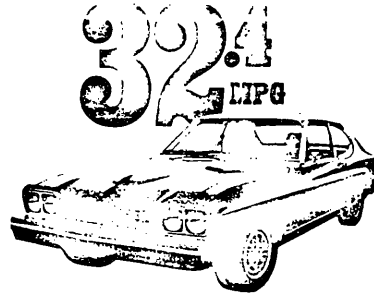
FORD MOTOR COMPANY HAS MADE MORE SMALL CARS* THAN ANYONE ELSE IN THE WORLD (THAT INCLUDES VW, AMC, TOYOTA, GM, FIAT, DAISSUN OR CHRYSLER)

*Small car: wheelbase under 112"



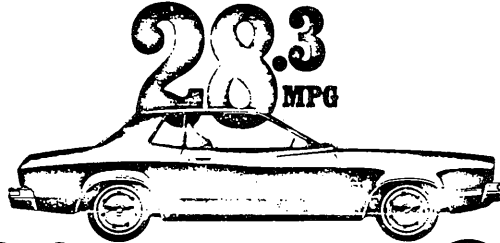
MERCURY COMET.

- Driver: Filip Roye
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers, vinyl roof



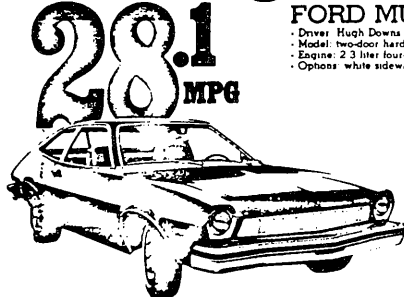
MERCURY'S CAPRI.

- Driver: Roger Rutherford
- Model: Sport Coupe
- Engine: 2.0 liter four-cylinder
- Options: none



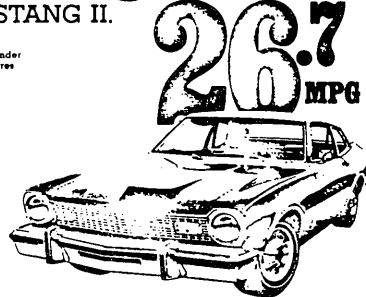
FORD MUSTANG II.

- Driver: Hugh Downs
- Model: two-door hardtop
- Engine: 2.3 liter four-cylinder
- Options: white sidewall tires



FORD PINTO.

- Driver: Mickey Sholder
- Model: two-door sedan
- Engine: 2.0 liter four-cylinder
- Options: white sidewall tires, wheel covers and Accent Group



FORD MAVERICK.

- Driver: Jane Mito
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers and Exterior Decor Group

Ford and Lincoln-Mercury dealers offer 35 different small car models and engines, 20 with sticker prices under the best-selling import model.



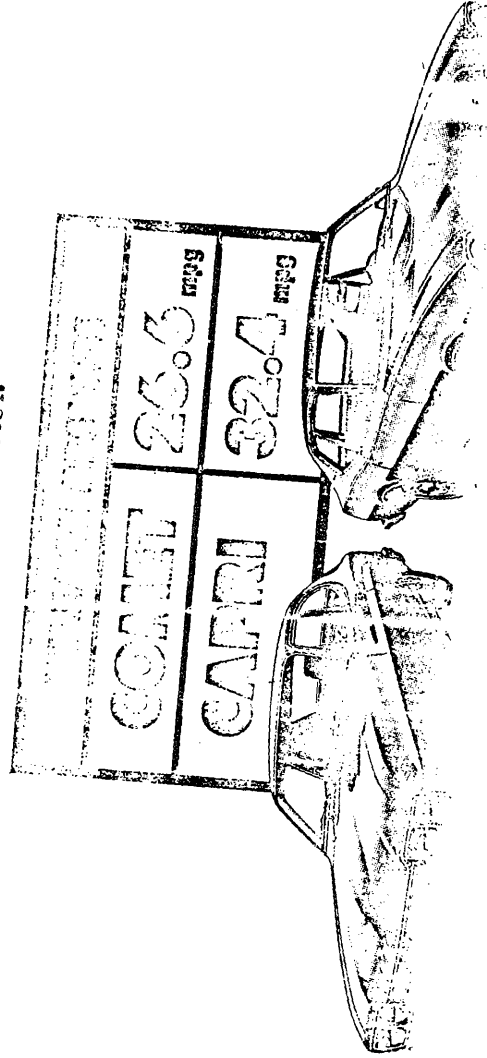
Complaint

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Two Lincoln-Mercury MILEAGE CARS

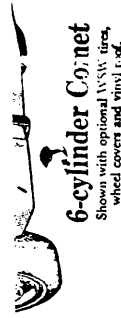
EXHIBIT

B A 6-cylinder Comet and a 4-cylinder Capri
 that to the test.

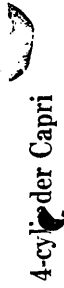


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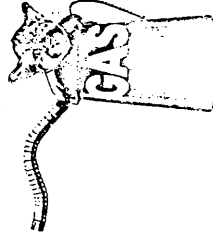
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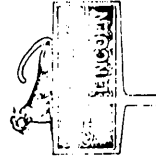
6-cylinder Comet
Shown with optional VSSW tires,
wheel cover and vinyl trim.



4-cylinder Capri



February 19, 1974: In a 379 mile highway test through Arizona and California, supervised by General Environments Corporation, a Comet and a Capri with standard engines and transmissions delivered the kind of gas mileage you'd like to get. Each car was broken in the equivalent of 6,000 miles and driven by non-professional drivers, never exceeding 50 mph. You yourself might actually average less, or for that matter more! Because mileage varies according to maintenance, equipment, total weight, driving habits and road conditions. And no two drivers, or even cars, are exactly the same. Stop in at your Lincoln-Mercury dealer's Mileage Headquarters and see what kind of mileage you can get.



Lincoln-Mercury Division



WASHINGTON
LEE D. BUTLER, INC.
1121 21ST STREET, N.W.
WASHINGTON, D.C.

SUBURBAN

DAVE PTILES LINCOLN-MERCURY, INC.
6500 LITTLE RIVER TURNPIKE
ALEXANDRIA, VIRGINIA

O'BREN & ROHALL, INC.
3910 LEE HIGHWAY
ARLINGTON, VA.

BILL ROGLEY LINCOLN-MERCURY, INC.
7809 WISCONSIN AVENUE
BETHESDA, MARYLAND

B. M. WOODFIELD MERCURY

26501 RIDGE ROAD
DAMASCUS, MARYLAND

HERRIDON MOTOR COMPANY, INC.
93 WASHINGTON AVENUE
HERNDON, VA.

TOM CURRO LINCOLN-MERCURY, INC.
123-27 WASHINGTON BLVD.
LAUREL, MARYLAND

JIM ECKELS LINCOLN-MERCURY, INC.
8389 CENTERVILLE ROAD
MANASSAS, VIRGINIA

WILSON POWELL LINCOLN-MERCURY, INC.
4700 BRANCH AVENUE
MARLOW HEIGHTS, MARYLAND

EAST-WEST LINCOLN-MERCURY, INC.
7501 ANNAPOLIS ROAD
LANDOVER HILLS, MARYLAND

THOMASSEN LINCOLN-MERCURY, INC.
1723 ROCKVILLE PIKE
ROCKVILLE, MARYLAND

SAFORD LINCOLN-MERCURY
8507 COLESVILLE PK.
SILVER SPRING, MARYLAND

CHESTER LINCOLN-MERCURY, INC.
8550 LEBURG PIKE
TYSON'S CORNER, VIRGINIA

INITIAL DECISION* BY MILES J. BROWN, ADMINISTRATIVE LAW
JUDGE ON MOTION FOR SUMMARY DECISION AND CROSS-MOTION
FOR SUMMARY DECISION

AUGUST 1, 1975

PRELIMINARY STATEMENT

[1] The Federal Trade Commission issued its complaint in this matter on December 10, 1974 (mailed January 2, 1975), charging respondent with unfair or deceptive acts or practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45).

By answer duly filed respondent denied that it had violated the Federal Trade Commission Act as alleged in the complaint. In addition, respondent raised certain affirmative defenses challenging the legal theory of the complaint on numerous grounds and further alleging that the Commission's simultaneous trade regulation rule proceeding on gasoline consumption rates denies it due process of law.

[2] On March 21, 1975, counsel supporting the complaint filed their motion for summary decision ("motion"). On May 15, 1975, respondent filed its cross-motion for summary decision and its opposition to complaint counsel's motion for summary decision ("cross-motion"). On June 13, 1975, complaint counsel filed their memorandum in opposition to respondent's motion for summary decision, and in support of complaint counsel's motion for summary decision upon all issues presented in this proceeding ("Memo. Op."). On June 27, 1975, respondent filed its reply to complaint counsel's opposition ("Reply").¹

In its answer to complaint counsel's request for admissions (Motion Exh. F) respondent admitted the dissemination in commerce of four advertisements (see Motion, Exh. A, B, C, D). The advertisements designated as Exhibits A & B, which were disseminated in February and March of 1974, appeared substantially as follows (see Cross-Motion, Att. A & B).²

Order to file Special Report ("6b order")³ (Motion, Exh. I).

On or about April 8, 1974, shortly after Exhibit A appeared, the Commission issued its order to file special report. Referring to Exhibit A and two other advertisements

* Reported as corrected by the administrative law judge's order dated August 25, 1975.

¹ The great part of the record in this proceeding is presented as Exhibits or Attachments to the Motion and Cross-Motion for summary decision. The references herein to such documents will be to the pleading and the exhibits such as "Motion Exh. J" or "Cross-Motion, Att. H," "Memo. Op. Exh. B."

² All substantive issues in this matter may be resolved on consideration of these two advertisements although the findings and discussion and conclusions relate to all four of the challenged advertisements.

³ The order to file special report and respondent's response thereto will be referred to herein as "6b order" and "6b report."

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**February 19th: General Environments Corporation
tested the highway mileage of Ford Motor Company's small cars.
Today: the results.**

All 5 Ford Motor Company small cars got over 26 MPG.

The test.

At 7:15 AM, February 19th, five small Ford Motor Company cars (wheelbase under 112") were driven from Phoenix to Los Angeles to learn the kind of mileage they could get.

The cars were regular production models with standard engines and transmissions. They weren't brand new.

They were broken in to simulate 6,000 miles of normal driving. All the cars used regular gas and had normal dealer preparation.

The drivers were not professionals. And they did not exceed 50 MPH. In many respects, the test was similar to one in which five 1974 Ford LTD's averaged 18.8 MPG.

The results.

All five small cars from Ford and Lincoln-Mercury delivered over 26 MPG.

Of course, the mileage you get may be less or even

more depending on many factors: equipment, engine displacement, total vehicle weight, road conditions and your driving style.

Ford and Lincoln-Mercury dealers offer more types of gas-saving engines for small cars than anyone.

Two 4-cylinder engines. The 2.0 liter is the smallest displacement engine available today in an American-made car from any major American manufacturer.

It was used in Pinto and Capri for this test. And a 2.3 liter was used in Mustang II.

Two 6-cylinder engines. A 200 CID was used in Mustang and Comet for this test. There is also an optional 235 CID available.

A V-6 engine. Ford Mustang II is the only car made by a major American manufacturer to offer an optional V-6. And Mercury's imported Capri offers an optional 2.8

liter V-6 engine in a car priced thousands of dollars less than any other V-6 powered import.

The smallest V-8. The 302 CID V-8 is the smallest displacement V-8 available from any major American manufacturer.

Explanation of engine designations. CID OR LITER: The total volume, in cubic inches or liters (metric system), that the pistons displace in all the engine's cylinders.



FORD MOTOR COMPANY HAS MADE MORE SMALL CARS*
THAN ANYONE ELSE IN THE WORLD (THAT INCLUDES
VW, AMC, TOYOTA, GM, FIAT, DATSUN OR CHRYSLER)

*Small car - wheelbase under 112"

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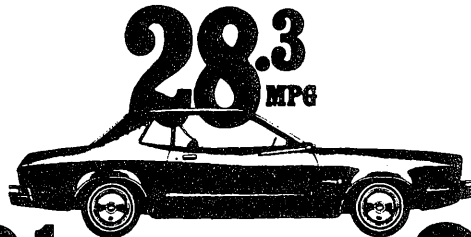
MERCURY COMET.

- Driver: Filip Rove
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers, vinyl roof



MERCURY'S CAPRI.

- Driver: Roger Rutherford
- Model: Sport Coupe
- Engine: 2.0 liter four-cylinder
- Options: none



FORD MUSTANG II.

- Driver: Hugh Downs
- Model: two-door hardtop
- Engine: 2.3 liter four-cylinder
- Options: white sidewall tires



FORD PINTO.

- Driver: Mickey Sholder
- Model: two-door sedan
- Engine: 2.0 liter four-cylinder
- Options: white sidewall tires, wheel covers and
- Access: Group



FORD MAVERICK.

- Driver: Jana Mulo
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers and Exterior Decor Group

Ford and Lincoln-Mercury dealers offer 35 different small car models and engines, 20 with sticker prices under the best-selling import model.

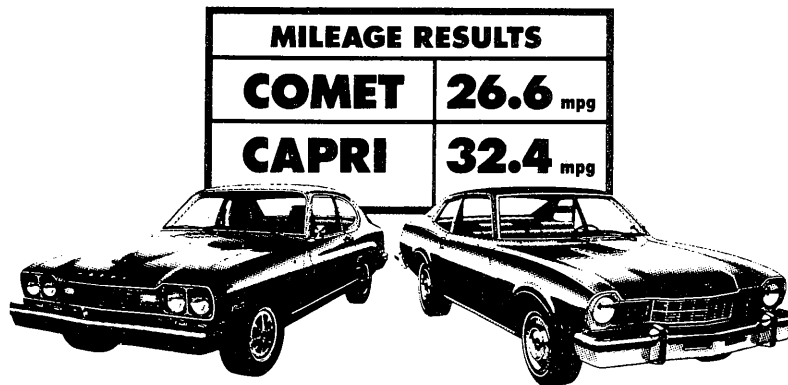


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Two Lincoln-Mercury MILEAGE CARS

A 6-cylinder Comet and a 4-cylinder Capri
put to the test.



4-cylinder Capri

6-cylinder Comet

Shown with optional WSW tires,
wheel covers and vinyl roof.



February 19, 1974: In a 379 mile highway test through Arizona and California, supervised by General Environments Corporation, a Comet and a Capri with standard engines and transmissions delivered the kind of gas mileage you'd like to get. Each car was broken in the equivalent of 6,000 miles and driven by non-professional drivers, never exceeding 50 mph. You yourself might actually average less, or for that matter, more! Because mileage varies according to maintenance, equipment, total weight, driving habits and road conditions. And no two drivers, or even cars, are exactly the same. Stop in at your Lincoln-Mercury dealer's Mileage Headquarters and see what kind of mileage you can get.

(DEALER'S NAME)



Sign of the Times

[6] *not* referred to in the complaint⁴ the order alleged that said advertisements appeared to make the following explicit or implied claims (*Id.* at Specification I).

1. That the gasoline consumption rates specified in the advertisements are representative of the performance an ordinary driver can expect routinely from standard production model cars equipped with the designated equipment when taking long or cross-country trips.

2. That the gasoline consumption rates specified in the advertisements are representative of the performance an ordinary driver can expect routinely from typical driving patterns or conditions.

3. That the gasoline consumption rates specified in the advertisements are representative of the performance an ordinary driver can expect routinely under all driving patterns or conditions.

As a preface to requesting specific detailed data relating to any substantiating tests, the 6b order stated in pertinent part:

With regard to each of these claims and without regard to whether you believe that the specified messages are contained in the attached advertisements, state whether or not the Corporation had in its possession substantiation for each of the specified claims at the time of dissemination of such advertising. For those claims which the Corporation maintains are substantiated by materials in its possession, submit copies of all documents and other substantiation involved.* * *

The order further required:

II. With regard to each of the claims set forth in Specification I [see 1., 2., and 3., *supra*], state your belief as to whether the claims are contained in the advertisements. If the Corporation is of the belief that the claims specified above are not contained in the advertisements please set [7] forth the claims which the Corporation believes are contained in the advertisements in question and submit all documents or other substantiation supporting such claims.

Response to Order to File Special Report ("6b Report") (Motion, Exh. J)

In its 6b report, respondent submitted a summary which reads in pertinent part:

The Commission's Order requires Ford to substantiate its recent highway fuel economy advertisements for five Ford LTD's and for a Pinto, Maverick, Mustang II, Capri and Comet.

These ads, based on test runs supervised by an independent testing agency, General Environments Corporation, accurately report that the vehicles were standard production units, driven over the highway from Phoenix to Los Angeles at speeds not over 50 miles-per-hour, that the LTD's averaged 18.8 miles-per-gallon, with a range of 16.3 to 20.3 miles-per-gallon, and that each of the five small cars got more than 26 miles-per-gallon.

⁴ One of these other advertisements related to the Ford LTD and the second to a TV commercial disseminated on the Bob Hope Special of January 24, 1974, featuring Hugh Downs.

The LTD's were driven by both professionals and nonprofessionals, at an average speed of 47.4 mph, while the small cars were driven by nonprofessionals only at an average speed of 48.4 miles-per-hour.

No other claims were made and the ads carefully pointed out that the mileage other drivers would get might be different depending on maintenance, driving habits, weight, equipment and driving conditions.

Each of the claims made is completely substantiated by the General Environments Corporation Reports and numerous affidavits of those participating in preparing for and conducting the test runs.

The Commission alleges that, by some implication, the ads make claims with respect to "ordinary drivers," "routine" expectations and "typical" or "all driving patterns and conditions." Such [8] claims were not made, expressly denied and cannot fairly be implied. Accordingly, Ford did not develop any substantiation for such alleged claims.
* * *

In response to Specification II of the order, respondent stated:

The Company does not believe that the ads and television commercial, * * * contain any claims, explicit or implied, that the gasoline consumption rates specified are representative of the performance an "ordinary driver" could expect "routinely" from standard production model cars equipped with the designated equipment when taking long or cross-country trips * * * or from typical driving patterns or conditions * * * or under all driving patterns or conditions * * *. Therefore, the Company has not prepared nor does it have within its possession substantiation for the information demanded in Specifications I-1, 2 and 3.

THE GASOLINE CONSUMPTION CLAIMS THAT THE COMPANY BELIEVES ARE SET FORTH IN THE ADS AND TELEVISION COMMERCIAL ARE AS FOLLOWS:

A. *1974 Ford LTD Ad and Television Commercial*

1. The Ford LTD can give you surprising gas mileage.
2. Independent test results reveal 18.8 mpg average of five production line Ford LTD 4-door pillared hardtops equiped with 351 CID V-8 engines when driven from Phoenix to Los Angeles, under highway driving conditions never exceeding 50 miles-per-hour * * *
3. Driven sensibly, the Ford LTD offers real economy and convenience on today's roads.

All three of these claims are further qualified by the express statement that mileage depends on maintenance, driving habits, total weight, road and driving conditions and *you may not get the same results*. The television commercial goes on to point out that *cars and drivers are never exactly alike*. (Underscoring added [by respondent]). [9]

B. *Small Car Test Ad: Pinto, Maverick, Mustang II, Comet and Capri*

1. All five Ford Motor Company small cars (regular production models) got over 26 mpg in highway driving between Phoenix and Los Angeles under the following conditions:
 - a. The cars were not brand new, but were broken-in to simulate 6,000 miles of normal driving;
 - b. The drivers were not professionals and did not exceed 50 miles-per-hour.

Again it was specifically stated that the mileage you get may be less or more

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depending on many factors: equipment, engine displacement, total vehicle weight, road conditions and *your driving style*. (Underscoring added[by respondent]). * * *

Following these statements, respondent submitted detailed technical data along with affidavits of the persons involved in both "mileage tests" to substantiate the claims it believed were made by the advertisements, including Exhibit A, the "small car" advertisement.

Significantly, respondent reported and submitted corroborating data, that, in connection with the small car test, each car was driven over the same, principally highway, route from Phoenix, Arizona, to Los Angeles, California, described the equipment on each of the small cars, noted the fact that no air conditioning was employed, described the highway driving conditions and the results achieved in miles-per-gallon. Also reported was how the vehicles were selected, how they were "broken-in" and pre-tested prior to the actual test including the results of that pre-test, as well as a description of the drivers and the speeds driven during the tests. In this respect respondent stated:

* * * The small car test originally started out with three each: Pintos, Mavericks, Mustang II's, Capris and Comets * * * They were broken-in and tested at our Kingman, Arizona Test Facility and the vehicle obtaining the lowest fuel economy was selected for the actual test. This assured us that the vehicles [10] finally used in the test represented the kind of performance available to most of our customers. * * * [T]he car samples used were such that approximately 80 percent of the population of similar vehicles would produce similar or better results in similar tests.

In further response, respondent stated:

The Company has no evidence that any or all of the conditions under which these tests were conducted approximate or are equal to conditions under which an ordinary driver would operate his automobile when taking long or cross-country trips, or under typical driving patterns involving both long distance and urban/suburban driving patterns or conditions, or are in fact representative of all driving patterns or conditions encountered by motorists. Neither does the Company have any documents that would tend to show whether or not the conditions under which these tests were run are typical or atypical of conditions encountered by ordinary drivers. As previously stated, our ads specifically pointed out that mileage was subject to many variables depending on individual routes, drivers and conditions. Obviously, no claim was made as to an "ordinary" driver or as to "typical" conditions.

And in specific response to the Specification I-1, respondent stated:

The Company took great pains to specifically point out that no driver could routinely expect a particular mileage performance since "mileage depends on maintenance, driving habits, total weight, road and driving condition," and "*you may not get the same results.*" (Underscoring added [by respondent]). In addition, the advertised results were clearly limited to a test run which "never exceeded 50 mph, and was conducted with 6,000-mile vehicles." Clearly, the ad did not represent that these gasoline consumption rates would be obtained by an ordinary driver (though they could be). Rather, these rates

were explicitly stated to be the results obtained by individual drivers under the particular conditions outlined in the ad.

Thus the Company sees no need for and has no substantiation of the claim postulated in Commission Inquiry I-1. However, [11] as indicated in the affidavits of John VanDewater * * * if other groups of the cars involved were driven over the same course, in the same manner and under the same conditions * * * at least 80 percent of the population of similar vehicles in a similar test could be expected to obtain equivalent or better mileage as in the small car test.

Finally, in conclusion, respondent added:

The Company believes that the foregoing Responses and information referred to therein fully substantiate the mileage claims actually made in the ads in question.

* * * * *

The Company does not believe the ads in question in any way claim that the gasoline consumption rates set forth relate to any drivers, type of driving or driving conditions other than those carefully detailed therein; however, if other drivers practiced the fuel-economy conservation measures recommended in Enclosure A-14⁵ and drove over the test route in question in the same model vehicles with the same equipment and under the same conditions as the test vehicles, we are confident (Enclosures A-13 and B-15) that these drivers would obtain the gasoline mileage similar to that reported in the ads.

COMPLAINT

The heart of the Commission's complaint contains the following allegations:

PARAGRAPH SIX: Said Exhibits A and B and others substantially similar thereto contain one or more false, deceptive and misleading representations and fail to disclose facts which are material in the light of the representations contained therein. Therefore, the representations contained in said advertisements were, and are, deceptive and/or unfair.

PARAGRAPH SEVEN: Said Exhibits A and B and others [substantially] similar thereto (hereinafter referred to as said advertisements) represent, directly or by implication, that the gasoline consumption rates specified in the advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips.

[12] PARAGRAPH EIGHT: In truth and in fact, at the time respondent made the representations as alleged in Paragraph Seven respondent did not possess and rely upon a reasonable basis for making these representations. Therefore the said advertisements were, and are unfair and/or deceptive.

PARAGRAPH NINE: Said Exhibits A and B and other substantially similar thereto represent, directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraph Seven.

PARAGRAPH TEN: In truth and in fact, at the time respondent made the representations as alleged in Paragraph Nine respondent had no reasonable basis for making the representations as alleged in Paragraph Seven. Therefore, the said advertisements were, and are deceptive and/or unfair.

PARAGRAPH ELEVEN: Respondent failed to disclose in said advertisements that it had no evidence that any or all of the conditions under which the tests described in the

⁵ Ford's *The Closer You Look Fuel Economy Book*.

advertisements were conducted approximated or equalled the conditions under which an ordinary driver would operate his automobile when taking long or cross-country trips and that respondent had no evidence that would tend to show whether or not the conditions under which said tests were run were typical or atypical of conditions encountered by ordinary drivers.

PARAGRAPH TWELVE: The facts set forth in Paragraph Eleven are material in light of the representations contained in said advertisements and their omission make these advertisements misleading in a material respect. Therefore, the said advertisements were, and are deceptive and/or unfair.

ANSWER (“ANS.”)

In its answer, respondent denied that it had made the representation alleged in Paragraph Seven of the complaint and asserted that “gasoline consumption rates an ‘ordinary driver’ can ‘typically obtain’ is not a valid or meaningful concept.” Respondent averred that it had a “reasonable basis” for believing that the gasoline consumption rates obtained in the test described in said advertisements were [13] generally indicative of, relevant to, and within the range of gasoline consumption rates reasonably obtainable from the advertised vehicles in the trip described in said test or trips similar thereto, subject to the limitations affirmatively asserted in each such advertisement, and

further avers, assuming *arguendo* that the gasoline consumption rates an “ordinary driver” can “typically obtain” is a valid and meaningful concept, that respondent’s test reported in said advertisements constituted and constitutes a reasonable basis for believing that the gasoline consumption rates specified in the advertisements approximate or equal the performance an “ordinary driver” can “typically obtain” from standard production models of the advertised cars when taking long or cross-country trips.

Admitting that respondent had not made disclosures as alleged in Paragraph Eleven of the complaint, respondent asserted that it had expressly advised consumers that the mileage they would get from the advertised cars might differ from the mileage quoted in the advertisements, by means of disclosures such as the following:

a. Of course, the mileage you will get depends on many factors: equipment, engine displacement, vehicle weight, local road conditions and your personal driving style. So the mileage you get may be less or even more than the figures quoted above. (Exhibit A * * *)

b. You yourself might actually average less, or for that matter more. Because mileage varies according to maintenance, equipment, total weight, driving habits, and road conditions. And no two drivers, or even cars, are exactly the same. (Exhibit B * * *)⁶

Complaint Counsel’s Motion for Summary Decision (“Motion”)

⁶ The six affirmative defenses asserted by respondent are in my opinion all legal questions, and they are discussed in the DISCUSSION part or REMEDY part of this opinion (*infra*, pp. 20 - 34).

In their motion for summary decision complaint counsel assert that, in their opinion, based on the documents and affidavits attached thereto, there were no genuine issues [14] as to the facts relating to Paragraphs Seven through Twelve of the complaint and that they were entitled to a ruling in their favor on the issues raised in those paragraphs as a matter of law.

The material submitted in support of complaint counsel's motion consist of the following:

- Exh. A — "5 Small Cars" Advertisement (Exh. A to Comp.)
- Exh. B — "Comet-Capri" Advertisement (Exh. B to Comp.)
- Exh. C — "Comet" Advertisement
- Exh. D — "Thinking Small Car" Advertisement
- Exh. E — Request for Admissions
- Exh. F — Answer to Request for Admission
- Exh. G — Affidavit of Ivan L. Preston Attachment - Preston Vita
- Exh. H — Affidavit of D. Morgan Neu Attachment 1 - Starch Report, Scope, Method and Use Attachment 2 - Starch Report on "5 Small Cars" Advertisement - Time Magazine Attachment 3 - Starch Report on "5 Small Cars" Advertisement - Newsweek
- Exh. I — Order to File Special Report
- Exh. J — Response to Order to File Special Report
- Exh. K — Statement of Ford Motor Company - Trade Regulation Rulemaking Proceeding - Advertising of Automobile Fuel Economy, Dated November 25, 1974.

It is complaint counsel's position that it is entirely proper for the administrative law judge, upon examination of the advertisements themselves, to make the factual determination as to whether they contain the representations alleged in the complaint, and that if such a determination is made in their favor, the issues presented as to whether respondent had a "reasonable basis" for such a claim may be resolved on the basis of respondent's 6b report.

As to the issue of proper disclosure of material facts, counsel assert that the administrative law judge could make a determination on examination of the advertisements in light of respondent's 6b report.

Respondent's Cross-Motion for Summary Decision and Opposition to Complaint Counsel's Motion for Summary Decision (Cross-Motion)

In its cross-motion and opposition respondent contends that the advertisements in issue were not intended and did not [15] make the representation alleged in the complaint and that if such representation was made, it was true. Respondent also contends that it had a reasonable basis on which to make such a representation and in support thereof presents data and opinions which it maintains corroborate the

existence of such a reasonable basis. (See Attachments H, I, J, K, L, M, N, O, P, Q, R.)

All of the material submitted by respondent may be described as follows:

- Att. A — "5 Small Cars" Advertisement (Exh. A to Comp.)
- Att. B — "Comet-Capri" Advertisement (Exh. B to Comp.)
- Att. C — "Comet" Advertisement
- Att. D — "Thinking Small Car" Advertisement
- Att. E — Affidavit of Robert A. Schneider - Report on Burke Day-After-Recall Survey on Exhibit A to Complaint
- Att. F — Affidavit of D. Morgan Neu (and reprint of Motion, Exh. H, with attachment)
- Att. G — Letter dated July 8, 1974, to Secretary, Federal Trade Commission, from Ford Motor Company, re: Proposed Addition of Sec. 3.40 to Commission's Rules of Practice.
- Att. H — Affidavit of Howard P. Freers, on 1974 Test Tract Fuel Economy and opinion on "reasonable basis"
- Att. I — Affidavit of Robert W. Irvin, writer Detroit News - Detroit to Chicago trip February 19, 1974.
- Att. J — Affidavit of DeWain C. Belote - EPA Highway Fuel Economy Driving Cycle Results, April 30, 1975.
- Att. K — Affidavit of Fred K. Kern, Jr. corroborating opinion of Freers on "reasonable basis"
- Att. L — Affidavit of Donald A. Klokkenga - Vehicle Mission Simulation Results, May 7, 8, 1975.
- Att. M — Affidavit of Harley E. Holt - Opinion on report of Fuel Consumption Tests
- Att. N — Affidavit of Hugh Downs (test driver)
- Att. O — Affidavit of Jana Milo (test driver)
- Att. P — Affidavit of Phillip Roye (test driver)
- Att. Q — Affidavit of Roger Rutherford (test driver)
- Att. R — Affidavit of Mickey Sholdar (test driver)

Finally, respondent asserts that the advertisements did not fail to disclose any material facts and were not misleading in any other respect. [16]

Complaint Counsel's Memorandum In Opposition to Respondent's Cross-Motion for Summary Decision ("MEMO. OP")

In their answering memorandum complaint counsel argue that respondent should not now be permitted to take a contrary position to its earlier sworn admission that it did not possess or rely upon substantiation for the type of advertising representation alleged in the complaint. Complaint counsel argue that the new material presented

by respondent in its cross-motion must not be accorded probative weight as to the "reasonable basis" issue unless it was in respondent's possession and relied upon at or before the time the advertisements were disseminated. In this respect complaint counsel would have the administrative law judge evoke "judicial estoppel" in order to avoid a situation which would be an affront to the Commission's "Ad Substantiation Program."

In addition complaint counsel appended the following material to their memorandum:

Exh. A — Affidavit of Ivan L. Preston commenting on Burke Marketing Research Survey

Exh. B — Attachment A to Publication of 1975 Fuel Economy Data

Respondent's Reply to Complaint Counsel's Opposition ("Reply")

Finally, respondent, in way of reply to complaint counsel's opposition to its cross-motion, contends that any ruling which would preclude its showing any fact which demonstrated "reasonable basis", whether or not contained in the 6b report, would be contrary to the Commission's Rules of Practice and a violation of their procedural (Administrative Procedure Act) and constitutional rights (Reply, pp. 6 - 21).⁷

Summary Decision

Section 3.24 of the Commission's Rules of Practice authorizes the Administrative Law Judge to entertain and grant a motion for summary decision if the pleadings, admissions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law.

[17] Upon consideration of the pleadings (complaint and answer), the admissions of respondent as to the dissemination of the advertisements, the affidavits filed by both parties, the 6b report, and the briefs filed in this matter, it appears to the administrative law judge that there is no genuine issue as to the evidentiary facts relevant to the issues presented in the pleadings and, accordingly, this matter may be properly disposed of by summary decision.

The evidentiary record in this case will consist of the pleadings and the various materials submitted by the parties as Exhibits and Attachments to the motions and memoranda. These materials are described above and will be referred to and discussed hereinafter. Any motions appearing in the record not heretofore or herein specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied.

⁷ Respondent's Motion for Leave to File Reply to Complaint Counsel's Memorandum in Opposition is granted.

Having reviewed said evidentiary record, and the arguments presented by complaint counsel and respondent, I make the following findings as to the facts:

FINDINGS OF FACTS

1. Respondent Ford Motor Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at The American Rd., Dearborn, Michigan. (Admitted, Ans.)

2. Respondent is now, and for some time last past, has been engaged in the manufacture, distribution, sale, and advertising of various products including automobiles. (Admitted, Ans.)

3. Respondent causes the said products, when sold, to be transported from its place of business in various States of the United States to purchasers located in various States of the United States and in the District of Columbia. Respondent maintains, and, at all times mentioned herein, has maintained, a course of trade in said products in commerce. The volume of business in such commerce has been and is substantial. (Admitted, Ans.)

4. In the course and conduct of its said business, respondent has disseminated and caused the dissemination of advertisements concerning its aforementioned products including automobiles in commerce by means of advertisements printed in magazines and newspapers distributed by the mail and across State lines and transmitted by television stations located in [18] various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products including automobiles. (Admitted, Ans.)

5. Among the advertisements so disseminated or caused to be disseminated by respondent are the advertisements set forth in this initial decision (*supra*, pp. 3-5, Admitted, Ans.; see Ans. to Request for Admissions, Motion, Exh. F). In addition, respondent disseminated or caused to be disseminated Exh. C and D to motion for summary decision (see Ans. to Request for Admissions, Motion, Exh. F).

6. Exhibit A was disseminated or caused to be disseminated by respondent in newspapers of general circulation and magazines distributed nationally, including the March 11, 1974 issues of *Time* and *Automotive News*; the March 18, 1974 issue of *Newsweek*; the *Wall Street Journal*, Midwest and Pacific editions, February 27, 1974; *Wall Street Journal*, Eastern and Southwest editions, February 28, 1974; the *Seattle Post Intelligencer*, February 22, 1974; and the *Seattle Times*,

February 22, 1974. (Admitted, Ans. to Request for Admissions, Motion, Exh. F.)

7. Exhibit B was disseminated or caused to be disseminated by respondent in newspapers of general circulation during February and March 1974 in the following cities: Detroit, Cleveland, Atlanta, Jacksonville and St. Louis. (Admitted, Ans. to Request for Admissions, Motion, Exh. F.)

8. Exhibit C to complaint counsel's motion for summary decision was disseminated or caused to be disseminated by respondent in newspapers of general circulation in the following cities on July 8 and 9, 1974: Boston, Chicago, Cleveland, Dallas/Fort Worth, New York, Philadelphia, Detroit, and Washington, D.C. (Admitted, Ans. Request for Admissions, Motion, Exh. F.)

9. Exhibit D to complaint counsel's motion for summary decision was disseminated or caused to be disseminated by respondent in the following newspapers of general circulation during April 1974: New York: *Daily News, Times, Newsday, Westchester-Rockland*; Chicago: *Tribune, Sun-Times*; Detroit: *News, Free Press*; Los Angeles: *Times, Herald Examiner, Long Beach Independent, Press Telegram*; Philadelphia: *Bulletin, Inquirer*; Washington, D.C.: *Post, Star-News*; Boston: *Globe, Herald American*; San Francisco: *Chronicle/Examiner, Oakland Tribune, San Jose Mercury News*; Cleveland: *Plain Dealer, Press*; Dallas/Fort Worth: *News, Times Herald, Star Telegram, Press*. (Admitted, Ans. Request for Admissions, Motion, Exh. F.)

[19] 10. Said Exhibits A, B, C, and D represent, directly or by implication, that the gasoline consumption rates specified in the advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips (Advertisements themselves; see also Cross-Motion, Att. E), (Burke Report-Verbatim Responses; Memo. Op. Exh. A), (Preston affidavit).

11. At the time respondent made the representation set forth in Finding 10, *supra*, it did not possess or rely upon a reasonable basis for making that representation (Motion, Exh. J(6b Report); see also Cross-Motion Att. H).

12. Dissemination of advertisements containing specific gas consumption claims without a reasonable basis for said claims is an unfair act and practice.

13. Said Exhibits A, B, C, and D represent directly or by implication that respondent had a reasonable basis for making the representation set forth in Finding 10, *supra*. (Advertisements Themselves.)

14. At the time respondent made the representation set forth in

Finding 13, *supra*, it had no reasonable basis for making the representation set forth in Finding 10, *supra*. (see Finding 11, *supra*.)

15. Dissemination of advertisements falsely representing that respondent had a reasonable basis for specific gas consumption claims is an unfair and deceptive act and practice.

16. Respondent had no evidence at the time it made the representations set forth in Findings 10 and 13, *supra*, that any or all of the conditions under which the tests described in the advertisements were conducted approximated or equalled the conditions under which an ordinary driver would operate his automobile when taking long or cross-country trips nor did respondent at the time it made the representations set forth in Findings 10 and 13, *supra*, have evidence that would tend to show whether or not the conditions under which said tests were run were typical or atypical of conditions encountered by ordinary drivers (Motion, Exh. J (6b report)).

17. The fact that respondent had no evidence as to the matters set forth in Finding 16, was a material fact in light of the representations made as set forth in Findings 10 and 13, *supra*.

[20] 18. The description of the test and the limitations set forth in the advertisements were not an adequate disclosure of the material facts set forth in Finding 16, *supra*.

19. Failure to disclose material facts in advertisements is an unfair and deceptive act and practice.

20. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Ford Motor Company has been, and now is, in substantial competition in commerce with corporations, firms and individuals engaged in the sale and distribution of automobiles of the same general kind and nature as that sold by respondent.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, The Ford Motor Company.

2. The said acts and practices challenged in the complaint were all to the prejudice and the injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and/or deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

THE REPRESENTATION

It is well established that the meaning of an advertisement is a

question of fact that may be determined by an examination of the advertisement itself. *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523 (5th Cir. 1963); *J. B. Williams Co., Inc. v. Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

Upon viewing the advertisements in question the administrative law judge is satisfied that the representation alleged in the complaint is not only a reasonable interpretation of the message conveyed by the advertisement considered as a whole, but is the principal message a consumer-reader would receive from either a casual look at the so-called headline portion thereof or from a more detailed reading of the entire text of the advertisement.

At least since the Fall of 1973, due to the so-called energy crisis and/or the increasing price of gasoline, gasoline consumption claims have been and are of utmost interest to the consumer. The consumer's interest is not in what someone [21] else is getting in the way of gas mileage, but rather in what performance he or she is getting or would get. Any advertisement such as Exhibit A which prominently displays gas consumption claims in specific numerical miles-per-gallon is bound to be interpreted by the consumer at first glance as a promise as to the gas consumption rate he or she could expect if he or she owned the advertised car. One way of describing this understanding is, as stated in the complaint, *i.e.*, what an "ordinary driver" could "typically obtain" in the way of gas mileage.

Respondent, throughout the development of this case has adamantly argued that the concept of an "ordinary driver" and a "typically obtained" gasoline consumption rate is meaningless, in that neither actually exist due to the numerous variances that affect gas consumption. Respondent misses the point of such verbal descriptions. The best explanation is that such language equates gasoline consumption to the impersonal, unknown "YOU" to whom the advertisement is necessarily directed.

Respondent also has contended throughout that it never intended to make the representation alleged. But the advertisements are clearly directed to prospective consumers' expectations, instead of merely reporting on a particular test situation. Exhibit A, for example, stresses that the cars tested "were regular production models with standard engines and transmissions. They weren't brand new. They were broken in to simulate 6,000 miles of normal driving. All the cars used regular gas and had normal preparation. The drivers were not professionals. And they did not exceed 50 MPH * * *" Clearly such a group of statements equate the test conditions over an actual highway (Phoenix to Los Angeles) to what a consumer might expect in normal driving. But there is more: The advertisement continues: "Of course,

the mileage you get may be less or even more depending on many factors; equipment, engine displacement, total vehicle weight, road conditions and your driving style." I think it is clear that the advertisement equated the test and the test results to what a prospective consumer could expect to get in the way of gas mileage from any of the 5 small cars referred to.

The language of Exhibit B is similar: "* * * a Comet and a Capri with standard engines and transmissions delivered the kind of gas mileage you'd like to get. Each car was broken in the equivalent of 6,000 miles and driven by non-professional drivers, never exceeding 50 M.P.H. You yourself might actually [22] average less, or for that matter more. Because mileage varies according to maintenance, equipment, total weight, driving habits and road conditions. And no two drivers, or even cars, are exactly the same. Stop in at your Lincoln-Mercury dealer's Mileage Headquarters and see what kind of mileage you can get." This advertisement also equated the test results to what a prospective consumer could expect to get in the way of gas mileage from the two small cars referred to.

My conclusion that the representation alleged in the complaint was in fact contained in the challenged advertisements is fully corroborated by the Burke Market Research Survey submitted by respondent. Notwithstanding the analysis of the surveyors, the verbatim responses of the interviewees clearly demonstrate that a great number of them equated the mileage claims with what they ("you") might expect to obtain. This is close enough. (See Preston Affidavit, Memo. Op. Exh. A.) Compare Survey Results in *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), order affirmed, *Firestone Tire & Rubber Co. v. Federal Trade Commission*, 481 F.2d 246 (6th Cir. 1973).

It should be pointed out that the interpretation placed on the advertisements in the complaint is somewhat conservative, in that the allegation is limited to mileage claims for long or cross-country ("highway") trips. This gives the benefit of the doubt to respondent. Actually the Burke Research Report, and the verbatim responses therein, indicate that a large number of the interviewees did not qualify their understanding of the mileage claims to highway driving. Of course there may be many other representations or meanings to an advertisement than the one stated by the complaint, including those stated by respondent. This fact, however, does not detract from the finding that the advertisement did in fact also make the representation alleged in the complaint.

REASONABLE BASIS — THEORY OF THE COMPLAINT

The overriding issue in this case is whether respondent, at the time it

disseminated the challenged advertisements, had a reasonable basis for the gasoline consumption representations as stated in the complaint.⁸

[23] In support of their theory as to the scope of the "reasonable basis" issue, complaint counsel have cited several Commission cases, specifically: *Pfizer, Inc.*, 81 F.T.C. 23 (1972); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972); *National Dynamics Corp.*, 82 F.T.C. 488 (1973); and *Crown Central Petroleum Corp.*, Dkt. 8851 (Nov. 26, 1974).

In reading these cases over and over again I am impressed by the collage of different ideas and applications that have been put forth by the Commission in only a matter of three years, in what would appear to be a simple area of law. Perhaps in *Crown*, the Commission put to rest any idea that "reasonable basis" means anything different than "reasonable basis." At least the complaint in this matter seems to be precise in that respect.

Determination of whether an advertiser possessed and relied upon a "reasonable basis" for believing a representation to be true requires evaluation of "both the reasonableness of an advertiser's actions and the adequacy of the evidence upon which such actions were based" *Pfizer*, 81 F.T.C. at 64. The basic inquiry is whether the advertiser "acted upon information which would satisfy a reasonably prudent businessman" that the representation is true and that he thus acted in "good faith," *National Dynamics Corp.*, 82 F.T.C. at 553, 557.

Significantly, only one of the prior Commission "reasonable basis" cases has stood a good court test. In *Pfizer*, although the Commission said that respondent had not demonstrated that it had a reasonable basis to support its claims, the Commission further said that the record did not show that respondent lacked reasonable basis for its advertising claims. But, instead of remanding the matter for further proceedings, the Commission dismissed the complaint.

In *National Dynamics* the Commission held that notwithstanding the lack of competent tests, respondent did have "reasonable basis" for its claims and thus that issue did not go to court.⁹

Although *Crown* has filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, briefs have not yet been filed and it is not known in what context the "reasonable basis" issue will be raised.

But in *Firestone*, the Sixth Circuit clearly sustained the Commission's determination that the advertisement implied that Firestone's performance and safety claims had been substantiated by scientific

⁸ In *National Dynamics Corp.*, 82 F.T.C. 488, 553 (1973) the Commission stated: "The test in this case, as in each case that comes before us on these issues, should be whether on the full record the substantiation constitutes a reasonable basis for the challenged claims. * * * [A]s outlined herein, the substantiation shown to underlie the challenged performance claims has satisfied us that a reasonable basis for them existed."

⁹ See Commissioner Jones' intriguing dissent. 82 F.T.C. at 545.

tests and that the test relied on did [24] not constitute a substantiating scientific test, and that, accordingly, the unsubstantiated claim was unfair and deceptive irrespective of whether the Wide Oval tire would in fact "stop 25% quicker." *Firestone Tire & Rubber Co. v. Federal Trade Commission*, 481 F.2d 246, 251 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112.

REASONABLE BASIS — RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent contends that the failure to possess a "reasonable basis" for an advertising claim is neither unfair nor deceptive nor an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act and that such a decision is a matter for Congress and outside the Commission's power. (Ans. First affirmative defense; see also Cross-Motion at pp. 40-42).

This contention must be rejected. The entire legislative history surrounding the creation of the Federal Trade Commission demonstrates that Congress desired to create a body of experts to define unfair trade practices and thereafter to prevent those practices by issuing cease and desist orders against those persons, partnerships, or corporations who were engaged in the trade practices deemed to be "unfair." Although such determinations were subject to court review,¹⁰ the principal objective was to have the administrative agency stop unfair practices in their incipiency by defining them and this theme has prevailed throughout the history of the Commission; *The Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367 (1965); see *National Petroleum Refiners Ass'n. v. Federal Trade Commission*, 482 F.2d 672, 685, 688-689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

Then as now, the Commission may meet the needs of the times by using its power to define in the first instance what it considers "unfair." *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

This administrative law judge can think of few practices that are more "unfair" than for an advertiser to make a specific performance claim for its product without having a "reasonable basis" for such claim. If I read the Commission's cases correctly, it is of the same view. See *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972); *Pfizer*, 81 F.T.C. 23, 62 (1972).

[25] Absent a viable "money back guarantee" if the product does not perform as promised, it is an unfair practice to entreat a prospective customer to rely upon a performance claim that looks valid on its face

¹⁰ See *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

when the advertiser does not have a "reasonable basis" for the claim and where the prospective consumer can not verify the accuracy of the claim until after he has spent his or her money. When the product is a new automobile, the practice is even more "unfair."

Actually this is not a particularly novel case. The "false-proof" mock-up theory that evolved from the *Colgate-Palmolive* "sandpaper" case after remand from the First Circuit is very close. There the Commission had determined that it was "unfair" for an advertiser to represent in a television commercial that a depicted demonstration proved something about a product when in fact the demonstration involved the undisclosed use of a mock-up and did not prove anything. This result was reached notwithstanding the fact that the actual demonstration would constitute proof of the claim but, because of some technical problems, it was impossible to transmit the actual demonstration on television. The Commission's theory was sustained by the Supreme Court.¹¹

Thus to state the results of a gasoline consumption test in such a manner that the prospective consumer may expect to obtain the same gas economy, where in fact the test does not actually prove that the consumer would obtain such gas economy, is, in my opinion, very analogous to the undisclosed use of a mock-up in a "to-prove" advertisement.

Respondent also contends that the Commission's "reasonable basis" doctrine shifts the burden of proof in a Section 5 enforcement proceeding thus depriving it of due process (Ans.; Second and Third Affirmative Defenses; see Cross-Motion pp. 42-43). The simple answer is that the procedural steps of proof that evolve from a "reasonable basis" case are more akin to the "show cause" procedures that are literally part of the Federal Trade Commission's statutory mandate. I am not aware of any constitutional bar to a "show cause" procedure in administrative law. Nevertheless, in the proceeding before us complaint counsel carried their burden to show the challenged advertisements and the material respondent ostensibly had relied upon as substantiation for the claims made in the advertisements. In this proceeding the burden of proof shifted properly.¹²

[26] Respondent also contends that the imposition of a vague, ill-defined "reasonable basis" duty creates a chilling effect upon the dissemination of truthful and informative advertising representations, thereby impinging on First Amendment rights (Ans.; Second and Third Affirmative Defenses; see Cross-Motion pp. 44-46). Taken to its

¹¹ *Colgate-Palmolive Co.*, 62 F.T.C. 1269 (1963), order set aside, 326 F. 2d 519 (1st Cir. 1963), Commission order reinstated, 380 U.S. 374 (1965).

¹² Without comment the administrative law judge notes that respondent's burden-of-proof argument might be raised in a civil penalty enforcement proceeding under Section 5. But that is not this case.

logical conclusion, respondent might be arguing that it can safely engage in an inherently “unfair” practice because of its First Amendment privileges. The exception of “commercial” speech from absolute protection is not limited to “deceptive” or “untrue” statements, but necessarily extends to “unfair” trade practices.

Respondent also contends that applying the “reasonable basis” doctrine to representations that the Commission finds are implied in an advertisement, representations that respondent did not intend or expressly make, also raises serious questions of “free speech” and “due process” (Ans.; Third Affirmative Defense; see Cross-Motion pp. 46-47). This argument would be more persuasive in a case where the implied meaning was not so clear as it is here. In addition, however, is the omission of the material fact that respondent had no evidence supporting the claims. This omission makes the representation misleading even if the actual claim turned out to be true because of subsequent developments. There is no doubt that the Commission can require an affirmative disclosure to prohibit any misleading facet of advertising. See *Colgate-Palmolive Co.*, *supra*.

Respondent also argues that the “reasonable basis” concept is an announced rule of general application made without the notice-and-comment procedures required by the Administrative Procedure Act (Ans.; Fourth Affirmative Defense; see Cross-Motion pp. 47-52). Although the cases cited by respondent point up the practical differences between adjudication and rulemaking in order to establish legal obligations, no court has ruled that the Commission is precluded from defining “unfair” trade practices through the adjudicative procedures set forth in Section 5. Unlike rulemaking, respondent has the opportunity and has taken that opportunity of challenging the legal sufficiency of the “reasonable basis” concept imposed in this case.

REASONABLE BASIS — THE MERITS

In its 6b report respondent candidly admitted that it did not have any substantiation, other than the results of the Phoenix-Los Angeles test and previous test track results, [27] for their advertisements. Significantly, respondent denied making the claims attributed to said advertising by the Commission (see Motion, Exh. J).¹³

Although complaint counsel contend that respondent, having

¹³ In the Commission's 6b order the advertisement (Exhibit A, *supra*) was interpreted to make the following claim: “That the gasoline consumption rates specified in the advertisements are representative of the performance an ordinary driver can expect routinely from standard production model cars equipped with the designated equipment when taking long or cross-country trips” (Motion, Exh. I).

